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Twenty-eighth session

SUMMARY RECORD OF THE 574th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 19 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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The meeting was called to order at 2.10 p.m.

ELECTION OF OFFICERS (*continued*)

1. **The CHAIRMAN** invited nominations for the remaining post of Vice-Chairman of the Commission.

2. **Mr. LEBEDEV** (Russian Federation) nominated Mr. Tadeusz Szurski (Poland).

3. *Mr. Szurski (Poland) was elected Vice-Chairman by acclamation.*

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (*continued*) (A/CN.9/410)

Paragraphs 6-8 (*continued*)

4. **Mr. FOUCHARD** (France) questioned the reference in paragraph 6 to the possibility of inviting the parties to enter into a procedural agreement. A discussion of the rules governing procedure with the parties could be time-consuming and needlessly tie the hands of the arbitral tribunal in advance.

5. Commenting on the reference by the representative of the United States of America to the phrase "at the place of arbitration or at some other appropriate place" in paragraph 3, he said that a certain amount of flexibility should be preserved regarding the place where a meeting was to be held. There was a distinction between the official venue of the proceedings, which was that where the award would be delivered, and the place where the arbitral tribunal actually met, which should be left to the discretion of the tribunal.

6. **Mr. HOLTZMANN** (United States of America) said that he agreed with the representative of France that the arbitral tribunal should be free to meet wherever it wished. However, such flexibility was not permitted under certain rules and laws, and the Notes should take account of those cases.

7. With regard to the consultations envisaged in paragraph 8, he thought that more emphasis should be placed on the fact that they could take place at various times, be held in conjunction with hearings and be conducted by various methods.

8. Footnote 2 relating to paragraph 4 referred to the UNCITRAL Arbitration Rules. He suggested that the Notes would have wider acceptability if that footnote were deleted.

9. **Mr. SZURSKI** (Poland) said that he agreed with the comments of the representative of the United States of America on paragraphs 6 and 7.

10. The first sentence of paragraph 8 seemed to say that a meeting for consultations could be devoted only to procedure. Consultations were also held in some cases on matters of substance. The sentence could either be deleted or amended to read as follows: "A meeting can be devoted to procedure only or can be held in conjunction with a hearing on the substance of the dispute".

11. **Mr. SEKOLEC** (Secretariat) said that the sentence had been intended to convey that meaning and could be reworded to improve its clarity.

12. He asked the representative of France whether his objection to paragraph 6 related to the possibility of the parties reaching agreement on a limited procedural point, which was the intended purport, or to the risk of the phrase being misunderstood as an invitation to the parties to enter into a broader agreement on a set of arbitration rules, an eventuality dealt with in paragraph 15.

13. **Mr. FOUCHARD** (France) said that he had been fearful of the second interpretation. He had no objection to the parties being invited to reach agreement on a limited procedural point.

Paragraphs 9-11

14. **Mr. FOUCHARD** (France) expressed concern that the wording of the last sentence of paragraph 11 ("*... liste de contrôle pour l'établissement d'un ordre du jour*" in the French version), might be understood to imply that there would be an agenda and a meeting, whereas it had been agreed that the organization of the proceedings would not necessarily involve such a meeting. He was also unhappy with the idea of a "check-list", which implied that there was a long list of matters to be considered.

Section 1 of "Procedural Matters for Possible Consideration" (paragraphs 12-14)

15. **Mr. HOLTZMANN** (United States of America), supported by **Mr. GRIFFITH** (Australia), suggested that it would be more tactful to place the section dealing with deposits for costs later in the text. Many arbitrators would find it uncomfortable to open their consultations with the subject of deposits, most of which would go towards covering their own fees. The earlier draft of the Notes had placed the subject much later in the text, an approach consistent with most arbitration rules.

16. **Mr. SEKOLEC** (Secretariat) said that the item had come at the end of the Notes in the earlier draft, which followed the structure of many sets of arbitration rules. In the new structure, based on a chronological order it could perhaps, in view of its importance, be moved to fourth or fifth place.

17. **Mr. FOUCHARD** (France) said that in practice arbitrators were concerned about deposits. Tact was all very fine but it would be hypocritical to imply that deposits for costs were not among the early questions to be considered.

18. **Mr. ABASCAL ZAMORA** (Mexico) suggested combining the section dealing with deposits and that dealing with administrative services.

19. **The CHAIRMAN** suggested that it should be left to the Secretariat to move the three paragraphs to a more suitable place in the text.

Section 2

20. **Mr. CHOUKRI SBAI** (Observer for Morocco) proposed deleting the last sentence of paragraph 15. He did not agree that the consideration of a set of arbitration rules might unduly delay the proceedings or give rise to unnecessary controversy. In his view, it would expedite the proceedings. In the second sentence,

(Mr. Choukri Sbai, Observer for Morocco)

the words "the arbitral tribunal might consider it appropriate" could be replaced by the words "it is advisable for the arbitral tribunal".

21. **Mr. ABASCAL ZAMORA** (Mexico) said that he was in favour of deleting the last sentence, which implied that the parties should not be invited to consider adopting a set of arbitration rules. It was preferable, in his view, to base arbitral proceedings on tried and tested rules.

22. **Mr. HOLTZMANN** (United States of America) recapitulated certain practical objections raised at the previous session to the idea that arbitrators should invite parties to stipulate a set of arbitration rules where they had not already done so. Those criticisms were reflected in the Commission's report (A/49/17, para. 138). In support of the idea it had been said (*ibid.*, para. 139) that, where parties began such talks and their discussions showed signs of becoming protracted, the arbitrators could discontinue the talks; yet that might prove difficult and create bad feeling. Moreover, where parties had opted to use a set of rules — for example, those of the International Chamber of Commerce (ICC) — and one of them wished, say to challenge an arbitrator, its application would be rejected by ICC on the ground that the party had no standing with that body. Subsequent referral of the issue to a national court might well produce the same response, and not necessarily a rapid one. He believed that the possibility open to arbitrators in paragraph 15 could lead the parties into expense. It could also, by implication, discourage arbitrators from exercising their own discretion about the rules which were to apply to proceedings. Those considerations led his delegation to suggest the deletion of paragraph 15 or, failing that, the addition to it of further cautions.

23. **Mr. FOUCHARD** (France) broadly endorsed the remarks made by the United States representative. He believed the paragraph should be retained, however, since it usefully indicated that, in one way or another, arbitral proceedings must be organized. Perhaps the paragraph might state that the adoption of a set of rules was not a necessity, but that parties might consider it. At all events the caution expressed in the last sentence of the paragraph should remain.

24. **Mr. SZURSKI** (Poland) said that article 15 should be seen as dealing with ad hoc arbitrations, not administered ones. If an arbitral tribunal existed, it had to be assumed that it did so by virtue of an agreement between the parties which specified a place of arbitration and thus determined the applicable law. The text should recommend the parties to consider adopting a set of rules; if they did not do so, the applicable law would operate, and in most cases the arbitrators would thus have discretion to decide on the conduct of proceedings in regard to matters which the applicable law did not cover. He considered that paragraph 15 was well drafted and should remain as it stood.

25. **Mr. LEBEDEV** (Russian Federation) recognized that paragraph 15 raised complex issues, to which the United States had drawn attention. He did not, however, believe that undue delay would necessarily result where the parties, on the recommendation of the arbitrators, decided to agree on a set of rules. The important point was that, on a broad interpretation of the paragraph, arbitrators might suggest to the parties the adoption of a set of institutional rules, a course which could certainly produce unexpected results and huge complications. Paragraph 15 had merit, and in order to preserve it, but eliminate that defect, he suggested it should indicate that the parties might agree on the application of the UNCITRAL Arbitration Rules; after all, the Notes were drafted by UNCITRAL and the UNCITRAL Rules took account of the interests of all countries. Alternatively, the paragraph might indicate that the parties could agree on the application of either the UNCITRAL Rules or another international set of rules for non-administered arbitrations. He had in mind,

(Mr. Lebedev, Russian Federation)

for example, those of the Economic Commission for Europe. He agreed with the previous speaker that paragraph 15 should be seen as relating to non-administered proceedings only, and with his remarks about the operation of the applicable law. In applying it arbitrators would obviously take account of the international nature of the case.

26. **Mr. ABASCAL ZAMORA** (Mexico) said that, in proposing the deletion of the last sentence, he had seen the paragraph as directed in particular to the adoption of the UNCITRAL Rules, which were tried and tested; where they were to apply, the caution expressed in that sentence would be unnecessary. However, the considerations put forward by the United States representative were substantial ones. He therefore withdrew his proposal.

27. **Mr. GRIFFITH** (Australia) supported the course of action proposed by the Russian Federation, for the reasons expressed by its representative.

28. **Mr. HOLTZMANN** (United States of America) found the Russian suggestions unsatisfactory because, in his delegation's view, paragraph 15 contemplated administered as well as non-administered arbitrations. To limit it to the latter would unduly narrow the scope of the text, the purpose of which was to facilitate both kinds of proceedings.

29. **Mr. SEKOLEC** (Secretariat) asked the United States representative whether he wished paragraph 15 to include an express reference to institutional rules.

30. **Mr. HOELLERING** (United States of America) said that his delegation was opposed to the Russian suggestions; however, it continued to advocate the deletion of the paragraph.

31. **Mr. GRIFFITH** (Australia) said that the implementation of the Russian idea in a way which made clear the fact that paragraph 15 applied to non-administered arbitrations would not prevent the rest of the text from applying to administered proceedings.

32. **The CHAIRMAN** noted the support expressed for modifying paragraph 15 along the lines suggested by the Russian representative. Unless he heard any objection, he would take it that the Commission approved that suggestion.

33. *It was so agreed.*

Section 3

34. **Mr. SZURSKI** (Poland) said that the principle in paragraph 17 should be that translation was to be regarded as unnecessary unless the parties or the arbitrators decided otherwise. It could be assumed that, in international commercial arbitrations, arbitrators would be familiar with more than one language.

35. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that if paragraph 16 was addressed to the parties it should say that the tribunal should urge the parties to determine the language or languages to be used in the proceedings. If the parties did not agree in time, the arbitration tribunal should decide the question.

36. **Mr. MADRID** (Spain) agreed with the representative of Poland that the initial assumption should be that translation would normally not be needed, which would expedite matters. However, care should be exercised in drafting the Notes in order to avoid a peremptory tone.

37. **Mr. HOLTZMANN** (United States of America) said he did not believe that it should be assumed that all arbitrators could normally deal with all the languages involved in arbitration. Such a requirement would create very grave problems, especially in developing countries, and would limit the ability to have party-appointed arbitrators from particular countries. If the chairman did not come from either of the countries of the parties, interpretation and translation would be very necessary, particularly when one of the languages involved was not widely understood by persons serving as chairmen. The idea of a normal rule that translation was not required might be valid within a small region but would not apply in an international context. He would not favour any drafting changes and would support the retention of the current text.

38. **The CHAIRMAN** asked the Commission if it wished to retain the existing text of paragraph 16.

39. *It was so decided.*

40. **The CHAIRMAN**, after inviting delegations to indicate their attitude to the Polish proposal for the amendment of paragraph 17, noted that there was little support for it. He took it that the Commission could accept the existing text.

The meeting was suspended at 3.50 p.m. and resumed at 4.10 p.m.

Section 4

41. **Mr. FOUCHARD** (France) thought that the first sentence of paragraph 20 was unnecessary, as was the word "typically" in the second sentence.

42. In paragraph 21, he felt strongly that the first two criteria mentioned for the choice of the place of arbitration enumerated should be placed at the end of the list.

43. **Mr. SZURSKI** (Poland) agreed that the first sentence of paragraph 20 should be deleted. The second sentence should be amended to read: "If the place of arbitration has not been agreed upon directly by the parties or indirectly, e.g. in the applicable arbitration rules, it is in the power of the arbitral tribunal to determine it."

44. He agreed that the first two criteria listed in paragraph 21 should come at the end.

45. The second sentence of paragraph 22 should be deleted.

46. **Mr. GRIFFITH** (Australia) supported the deletion of the first sentence of paragraph 20.

47. With regard to paragraph 21, he noted that the text had been modelled on the relevant section of document A/CN.9/396/Add.1, appearing under the heading "Place of arbitration", where paragraph 1 contained the statement: "It is generally accepted that the arbitration is governed by the procedural law governing at the place of arbitration". As that provision would still seem to be apposite, he asked why it had been dropped.

48. **Mr. ABASCAL ZAMORA** (Mexico) supported the French proposal regarding the order of items in paragraph 21.

49. **Mr. HOLTZMANN** (United States of America) agreed that the order of items listed in paragraph 21 was inappropriate. Since it was not the purpose of the notes to lay down guidelines for arbitrators, the simplest solution would be to delete the entire paragraph.

50. **Mr. LEBEDEV** (Russian Federation) said that the formulation "perception of a place as being neutral", listed as (f) in paragraph 21, was unclear. Even if paragraph 21 was retained, that passage should be deleted.

51. **Mr. BOSSA** (Uganda) said that the Notes would be useful not only when arbitration was being considered but also to those drawing up agreements out of which arbitration might arise. The points listed under paragraph 21 would be useful to legal advisers and the paragraph should be retained.

52. **Mr. GRIFFITH** (Australia) suggested that paragraph 21 should be redrafted to mention the fact that the procedural law of the place of arbitration ordinarily governed the arbitration and also the relevance of the question whether States were parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

53. **Mr. SEKOLEC** (Secretariat) said that it had been mentioned in document A/CN.9/396/Add.1 that the choice of the place of arbitration largely determined the law governing procedure, but that parties were sometimes permitted to submit the arbitration to the procedural law of a country other than that where arbitration took place. That approach was rarely resorted to and raised many questions of a practical and theoretical nature. It had therefore been thought better not to mention it in the new text. However, item (c) in paragraph 21 made a reference to the law of the place of arbitration.

54. With regard to the New York Convention, it was the primary text but there were regions where other conventions existed and there were also bilateral treaties. A more general reference to treaties on enforcement of arbitral awards had therefore been preferred.

55. **Mr. RENGER** (Germany) said that paragraph 21 should be kept. He would not oppose a reordering of the items listed but would object to the deletion of item (f).

56. **Mr. HOLTZMANN** (United States of America) thought that the key provisions in the paragraph were the legal ones; however, the difficulty lay in drafting them, an example being the problem already mentioned that the law of some countries allowed parties to agree that proceedings would be governed by another law. Finding the right wording would be a sensitive task; even drafting on enforcement raised difficult problems. With regard to subparagraph (f), there were many reasons for choosing a place for arbitration, and he wondered to what extent "neutrality", however it was defined, was relevant. Did it mean that "neutral" countries were to be preferred? The paragraph created more problems than it solved.

57. **Mr. VRELLIS** (Observer for Greece) said his delegation was in favour of retaining the text in paragraph 21 as formulated by the Secretariat. The paragraph stated clearly that the relative importance of the factors listed varied from case to case. The fact that they had been listed in a particular order was not likely to be considered as of any significance from the legal viewpoint.

58. **Ms. ZHANG Yuejiao** (China) supported retention of the existing texts of paragraphs 20, 21 and 22.

59. **Mr. GRIFFITH** (Australia) said that subparagraph (c) seemed to be an oblique reference to the fact that arbitration was governed (unless some agreement to the contrary existed) by the procedural law in force at the place of arbitration. He found it curious that that factor was not given greater emphasis in the new text. The matter was of importance to his delegation, and he suggested that the point should be dealt with at the beginning of paragraph 21.

60. **Mr. CHOUKRI SBAI** (Observer for Morocco) considered that paragraph 21 should be retained because of the useful information it contained. Regarding subparagraph (f), what was meant was not political neutrality, but neutrality as far as the parties and their interests were concerned.

61. **The CHAIRMAN** said there had been a proposal to delete the first sentence of paragraph 20, but that it did not seem to have received support. There had been some proposals for changes in the order of subparagraphs in paragraph 21, but no clear support for deletion of the paragraph as a whole. One representative had proposed the deletion of the second sentence of paragraph 22, but others seemed to support the present text. He took it that it could be left to the Secretariat to take into account the comments made.

Section 5

62. **Mr. HOLTZMANN** (United States of America) said paragraphs 23 and 24 implied that arbitral institutions normally made arrangements for a variety of administrative services; in practice, most did not. The paragraphs should be redrafted to make clear that the services referred to were only those needed in connection with hearings, and not, for instance, photocopying or word processing, which would be taken care of by the parties themselves. He did not know of any arbitral institution which arranged travel or hotel bookings, unless the hearing was to be held in a very remote place. In paragraph 24, the phrase "... the institution will usually provide all or a good part of the required administrative support" should be reworded so as better to reflect the realities of the situation.

63. **Mr. FOUCHARD** (France) did not think it was UNCITRAL's role to provide guidance on such matters as travel arrangements and hotel bookings, which were completely outside its mandate. The text should not be made unduly complicated, and should not give the impression that arbitration was a large-scale undertaking which was costly, lengthy and required an extensive infrastructure: in fact, many arbitrations took only a few hours. It was important not to discourage businesses or countries with limited resources from going to arbitration by listing every possible kind of service that might be needed.

64. **Ms. ZHANG Yuejiao** (China) supported the proposal that paragraphs 23 and 24 should be redrafted.

65. **Mr. MADRID** (Spain) agreed that, while administrative services were important, there was no need to list them in such detail. A general statement that the need for administrative services should be borne in mind might be sufficient.

66. **Mr. LEBEDEV** (Russian Federation) agreed that the drafting of paragraphs 23-27 could be improved, but believed they should be retained as reflecting actual arbitration practice. It was important to make clear to those who had no experience of arbitration that there were often considerable costs involved. He supported the draft text in principle, but suggested that towards the end of paragraph 26 a further sentence might be added to the effect that, whereas in an administered arbitration the costs of engaging a secretary would be covered by the institution concerned, in a non-administered arbitration those costs would have to be met by the parties.

67. **Mr. CHOUKRI SBAI** (Observer for Morocco), in response to the comments made by the representative of France, said that while it was true that arbitration might take less time than normal legal proceedings, it could be costly, since arbitrators demanded high fees, sometimes a percentage of the sum claimed. Reference should therefore be made to administrative services, but preferably towards the end of the document, after more important items such as confidentiality, witnesses, and evidence.

68. **Mr. HERRMANN** (Secretary of the Commission) said that, in listing the various items possibly to be considered, the Secretariat had had in mind the order in which the need for them might arise in a typical case of arbitration, not their order of importance.

69. **Mr. SZURSKI** (Poland) proposed that in paragraph 27 the words in the penultimate sentence "... or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal", together with the following sentence, should be deleted, since the presence of the secretary at deliberations of the tribunal did not violate any arbitration principle.

70. **Mr. FOUCHARD** (France) supported that proposal: the words were ambiguous and should be deleted.

71. **Mr. CHOUKRI SBAI** (Observer for Morocco) said the presence of a secretary could raise problems, since in some legal systems arbitrators were required to swear an oath, whereas that requirement did not apply to the secretary. His delegation therefore wished to express its reservations as to the deletion proposed.

72. **The CHAIRMAN** said that the Secretariat would take due account of the comments made.

The meeting rose at 5.05 p.m.